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No.84-

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KENNETH O. EIKENBERRY,

Petitioner,

v.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Deputy Attorney General
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Seattle, Washington 98104
(206) 464-6254

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QUESTIONS PRESENTED

1. Does 28 U.S.C. Section 1291 authorize an interlocutory appeal by a state Attorney General of a civil contempt order against him for his refusal to comply with an order requiring him to reveal to a defendant or its counsel the identity of a confidential informant?

2. Is the informant privilege asserted by a state in a parens patriae action waived solely as a result of a confidential informant's appearance on television, when his face and voice were disguised beyond recognition, and when the state's only involvement in his television appearance was to comply with the television network's request that the

state advise the informant of the network's interest in speaking to him and to advise the informant that the decision whether to speak was entirely his own?

THE PARTIES BELOW

Petitioner, Kenneth O. Eikenberry ("Eikenberry"), the Attorney General of the State of Washington, was the Appellant in the Court of Appeals. The State of Washington ("Washington") is a plaintiff in the District Court in In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, MDL-150 WPG, which is pending in the United States District Court for the Central District of California. Respondents, who were the Appellees in the Court of Appeals, are defendants in the District Court. Respondents are Standard Oil Company of California ("Socal"), Atlantic Richfield Company,

Exxon Corporation, Gulf Corporation, Mobil Oil Company, Texaco Inc., and Union Oil Company of California.

TABLE OF CONTENTS

Questions Presented For Review. i

Table of Contents iv

Table of Authorities. vi

Opinions Below 1

Jurisdiction 1

Statute Involved 2

Statement of the Case 2

A. Introduction 2
B. Prior Proceedings Involving Washington's Informant 4
C. Proceedings Now on Appeal 6

Reasons For Granting The Writ 9

A. Introduction 9
B. The Court of Appeals Misapplied Relevant Caselaw to Reach the Wrong Result 10

C. The Informant Privilege Applies Here and Was Not Waived 21

D. The Writ Should Be Granted. . . .27

E. Conclusion 29

TABLE OF AUTHORITIES

STATUTES

15 U.S.C. Sections 15c-15f 24

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1291 . . . . .i, 2, 6, 8, 10, 11

28 U.S.C. Section 1292(b). 5

RULES

Supreme Court Rules, Rule 17 28

CASES

Albrecht v. Herald Co,
390 U.S. 145 (1968) 28

Alexander v. United States,
201 U.S. 117 (1905) 10

City of Burlington v.
Westinghouse Electric Corp.,
246 F.Supp. 839 (D.D.C. 1965)
on remand from 321 F.2d 762
(D.C. Cir. 1965) 22

David v. Hooker,
560 F.2d 412 (9th Cir. 1977) . .10, 18

Eastern Maico Distributors,
Inc. v. Maico-Fahrzeugfabrik,
658 F.2d 944 (9th Cir. 1981) . .14, 19

Fenton v. Walling,
139 F.2d 608 (9th Cir. 1943),
cert. denied 321 U.S. 798
(1944) . . .10, 11

Fleming v.
Federal Trade Commission,
670 F.2d 311 (1982) 23

In Re Attorney
General of the
United States,
596 F.2d 58 (2d Cir. 1979) 21

In re Coordinated
Pretrial Proceedings
in Petroleum Products
Antitrust Litigation,
MDL-150 ii

In re Emprise Corp.,
344 F.Supp. 319 (W.D.N.Y. 1972). . .22

In re Fish & Neave,
519 F.2d 116 (8th Cir. 1975) . .10, 18

In re Murphy,
560 F.2d 326 (8th Cir. 1977) 10

In Re United States,
565 F.2d 19 (2d Cir. 1977)
cert. denied 436 U.S. 362 (1978) . .21

Kordich v. Marine
Clerks Association,
715 F.2d 1392 (9th Cir. 1983). . . .14

Mitchell v. Bass,
252 F.2d 513 (8th Cir. 1958) 26

National Broiler
Marketing Assn.
v. United States,
436 U.S. 816 (1978) 28

Perma Life Mufflers,
Inc. v. International
Parts Corp.,
392 U.S. 134 (1968) 28

Roviaro v. U.S.,
353 U.S. 53 (1957) . .20, 22, 26, 27

Shillitani v.
United States,
384 U.S. 364,
86 S.Ct. 1531
16 L.Ed.2d 622 (1966). 19

United States v.
B. F. Goodrich Co.,
619 F.2d 798 (9th Cir. 1980) 24

United States v.
John Deere & Co.,
9 F.R.D. 523 (D.Minn. 1974) 22

United States v.
Julius Doochin
Enterprises,
370 F.Supp. 942 (M.D.Tenn. 1973) . .26

United States v.
Kelsy-Hayes Wheel Co.,
15 F.R.D. 461 (D.Mich. 1954) . .22, 23

United States v. Kohler Co.,
9 F.R.D. 289 (E.D.Pa. 1949) . .22, 23

United States v.
Real Estate Board
of Met. St. Louis,
59 F.R.D. 37 (E.D.Missouri 1973) . .26

Wirtz v. Continental
Finance and Loan Co.,
326 F.2d 561 (5th Cir. 1964) 23

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kenneth O. Eikenberry, Attorney General for the State of Washington, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on November 23, 1984.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 747 F.2d 1303 (attached as Appendix A). The District Court orders are unreported, but are attached as Appendices B and C.

JURISDICTION

The Court of Appeals entered its opinion on November 23, 1984, and this petition for certiorari was filed within ninety days of that date. Petitioners

invoke this Court's jurisdiction under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

This case principally involves 28 U.S.C. Section 1291, set out verbatim in Appendix D.

STATEMENT OF THE CASE

A. Introduction

The decision below denies Washington all meaningful review of a District Court order which would require it to disclose the name of the confidential informant in a law enforcement action, thereby exposing the informant to retaliation from one or more defendants and causing great damage to future state law enforcement activity throughout the nation.

Washington brought this action in 1977 against ten oil companies. The

state sued on its own behalf, on behalf of alleged classes of natural persons, on behalf of alleged classes of governmental entities, and as parens patriae on behalf of its citizens. The complaint charges the oil companies with retail price-fixing of refined petroleum products, primarily motor gasoline and heating fuel. Washington seeks damages, inter alia, for overcharges by the oil companies on these products. Washington's case was transferred to the Central District of California; combined there in MDL-150 with similar cases filed by California, Florida, Arizona and Oregon; and assigned to the Honorable William P. Gray, Senior United States District Judge.

B. Prior Proceedings Involving Washington's Informant

In 1979, the NBC television network broadcast a news story about MDL-150. The report included an interview with a man who was identified as a confidential informant for the states. The man's face and voice were "disguised beyond recognition," in the words of the District Court. (App. B at 2). Following the broadcast, defendant Socal served an interrogatory on Washington (and other MDL-150 plaintiffs) seeking the identity of the informant. Washington objected to the interrogatory on the ground that his identity was made confidential by the informant privilege.

After holding a hearing on the issue of Socal's interrogatory, the District Court ordered Washington to disclose the name of its confidential informant to

counsel for Socal for the purpose of an in camera deposition to determine whether his identity should be disclosed to all defendants. Washington appealed that order to the Court of Appeals under 28 U.S.C. Section 1292(b), and the Ninth Circuit granted permission for the appeal. After briefing by the parties and by 32 states as amici curiae for Washington, and after oral argument, the Court of Appeals revoked its permission to appeal as having been improvidently granted.

Subsequently, the District Court again ordered Washington to disclose the identity of its informant. On April 30, 1981, the District Court found Eikenberry to be in civil contempt when he declined to comply with the disclosure order.

That contempt order was appealed to the Ninth Circuit as a final order under

28 U.S.C. Section 1291. Socal, as appellee, did not dispute the jurisdiction of the Court of Appeals in that appeal. In May, 1982, the Court of Appeals reversed and remanded the contempt order. The District Court was ordered to determine whether the informant privilege applied before ordering any disclosure of the informant's identity. In its opinion, the Court mistakenly identified its jurisdictional basis as 28 U.S.C. Section 1292(b). Washington believed the citation to be a typographical error and filed a motion to correct the citation. The Court of Appeals, however, never ruled on that motion.

C. Proceedings Now On Appeal

On October 7, 1982, the District Court issued a "Memorandum of Decision and Order." The Court ruled that the

informant privilege applies in this state parens patriae antitrust action. The Court further held, however, that Washington had waived the privilege in this case because it had "facilitated" the informant's disguised appearance on NBC by providing the NBC producer's name and phone number to the informant with the advice that the decision to contact NBC was his alone to make. (App. B at 4). Accordingly, Washington was ordered to disclose to Socal's counsel the name, address, and last employer of the informant.

Eikenberry again declined to comply with this order, however, and the District Court entered a contempt order against him on November 17, 1982. This order is the basis of the present appeal. The contempt order also imposed civil sanctions of $100 per day on Eikenberry

(stayed pending appeal), and ordered him to pay the expenses and attorneys fees incurred by Socal "with respect to Washington's failure to comply with the Order of October 7, 1982," beginning January 5, 1981. (App. B at 10).

When Eikenberry appealed the second contempt order, Socal challenged the jurisdictional basis of the appeal, even though the first contempt appeal had proceeded to its conclusion on exactly the same Section 1291 jurisdiction! The Court of Appeals agreed, however, and dismissed Eikenberry's second contempt appeal. Thus, notwithstanding three appeals to the Ninth Circuit, Washington is to be denied any appellate review of the merits of the District Court's determination that Washington waived its informant privilege in this case.

REASONS FOR GRANTING THE WRIT

A. Introduction

The issue in this appeal has followed a long and tortuous path to arrive at this Court. At issue here is whether there can be any appellate review of the District Court order compelling the disclosure of the identity of the confidential informant. If, as the Court of Appeals concluded, such appeal can only come after trial, then the appeal of the disclosure order will be mooted by the disclosure of the man's identity as ordered by the District Court. The only meaningful appeal of a disclosure order would be before the disclosure.

The reasoning behind the decision below is fallacious and unjust. The precedent cited is completely misapplied; and the result frustrates the very purpose of the statute the decision

purports to interpret, 28 U.S.C. Section 1291.

B. The Court of Appeals Misapplied Relevant Caselaw to Reach the Wrong Result.

Eikenberry's appeal was based jurisdictionally upon the long-established rule that a third party has a right to appeal under 28 U.S.C. Section 1291 from an order adjudging the third party to be in civil contempt. Alexander v. United States, 201 U.S. 117 (1905); David v. Hooker, 560 F.2d 412 (9th Cir. 1977). This rule has been applied even in situations in which the third parties were counsel for a party or officers of corporate parties. In re Murphy, 560 F.2d 326 (8th Cir. 1977) (third party counsel); In re Fish & Neave, 519 F.2d 116 (8th Cir. 1975) (third party counsel); Fenton v.

Walling, 139 F.2d 608 (9th Cir. 1943), cert. denied, 321 U.S. 798 (1944) (third party corporate officers).

Relying upon the following logical syllogism, the Court of Appeals departed from this jurisdictional rule:

1. Major Premise:

   A contempt order or discovery sanction against a non-party is appealable under 28 U.S.C. Section 1291 unless "there is a substantial congruence of interests between the non-party and a party to the action." (p.4).

2. Minor Premise:

There is a substantial congruence of interests between Attorney General Kenneth O. Eikenberry and the State of Washington because:

a) If any financial penalty is awarded against Kenneth O. Eikenberry, the State may pay it, and

b) Kenneth O. Eikenberry is both counsel for the State and also "the state official in charge of initiating and conducting the course of litigation." (p. J)

3. Conclusion:

The contempt order is not appealable because of the

"substantial congruence of interests between Kenneth O. Eikenberry and the State."

Both premises of this syllogism and the conclusion are irrelevant or wrong.

The Court of Appeals drew its major premise from discovery sanction cases that are completely inapplicable to this appeal. The underlying issue here is whether the state must expose a confidential informant to oil companies. If the dismissal of the appeal is upheld, the man's identity will be disclosed, and his personal and financial security may be jeopardized. No less significant is the chilling effect of disclosure on the flow of information from informants generally, as a result of the knowledge that a court of law in this case required a law enforcement office to "burn" an informant. It would be a severe

injustice if this were allowed to occur without any appellate review on the merits of the disclosure order.

Notwithstanding the very grave implications of its decision, the Court of Appeals relied for its first premise on cases dealing with appeals of monetary sanctions in the context of ordinary civil discovery. The cases cited by the Court below in support of its first premise, Kordich v. Marine Clerks Association, 715 F.2d 1392 (9th Cir. 1983), and Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik, 658 F.2d 944 (9th Cir. 1981), are both appeals of monetary sanctions. In both of them, Courts of Appeal dismissed appeals from monetary sanctions for frivolous motions or breaches of discovery obligations. In both, the Courts of Appeal said that the penalty should be paid and any appeal

from the penalty should wait until the conclusion of the entire lawsuit.

The lesson of these two cases could hardly be less to the point here. It is obvious that, once the informant's identity is revealed, no appeal at the end of MDL-150, whenever that is, can protect against the consequences of the disclosure. Any delay in this appeal until the end of trial therefore will render the appeal meaningless. The District Court understood this reality:

> Attorney General Eikenberry of Washington has made a submission in which he acknowledges the jurisdiction over him of this Court, contends that in his view and the view of his colleagues the order was wrong, and he should not have to comply, and of course he asserts the obvious, that if he complies, why, it

makes any appeal moot. He desires to appeal, and, therefore, in order to get an appealable order he declines to adhere to the Court's order, and has instructed his colleagues not to comply with the Court's order. He went on to say, if this Court's order is sustained on appeal, he will comply.

That is what I intend to do with respect to the Attorney General, therefore. First, I want to state that I understand the position of the Attorney General. Naturally, I believe that the order entered by this Court was an appropriate order that should be complied with, but he has a right to seek to get the Court of Appeals to secondguess [sic] this Court, and I respect that; and I also appreciate the respectful manner in which Mr. Eikenberry

> has made his submission to this Court.

Appendix E at 3.

The Court of Appeals' failure to grasp this point is the reason why its minor premise is irrelevant. The alleged "congruence of interests" between the State of Washington and its Attorney General has nothing to do with this case. As observed by the District Court in the quotation above, Eikenberry has pledged to obey the disclosure order of October 7, 1982, if his efforts to secure appellate relief from the Court's order are unsuccessful. The monetary penalty imposed by the District Court is therefore irrelevant to this appeal.

The question here involves the harm of disclosure and not liability for a monetary penalty. This difference

distinguishes this appeal from the cases relied upon by the Court of Appeals. Indeed, this difference is expressly recognized and discussed in one of those cases, in language that is fully applicable to the instant circumstance:

> In civil contempt proceedings or Rule 37(b) sanctions against a non-party, even against an attorney to or an officer of a party, an appeal generally need not wait until final judgment in the case as a whole. See In re Fish v. Neave, 519 F.2d 116 (8th Cir. 1975) (attorney may appeal civil contempt sanction); David v. Hooker, Ltd., 560 F.2d 412, 416-17 (9th Cir. 1977) (officer of party may appeal Rule 37(b) sanction for violation of discovery order). But in such situations the purpose of the sanction is not simply

> to deter harassment and delay, but to effect some discovery conduct. See Shillitani v. United States, 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966). A non-party's interest in resisting a discovery order is immediate and usually separate from the parties' interests in delay. Before final judgment is reached, the non-party either will have surrendered the materials sought or will have suffered incarceration or steadily mounting fines imposed to compel the discovery. If the discovery is held unwarranted on appeal only after the case is resolved, the non-party's injury may not be possible to repair.

Eastern Maico Distributors v. Maico-Fahrzeugfabrik, supra, at 949.

The issue in the instant case is not whether a sanction is appropriate for detering harassment or delay, but rather

is whether a law enforcement officer must disclose the identity of an informant. The Court of Appeals' conclusion is wrong in requiring disclosure before appellate review is allowed. To reach this conclusion the Court of Appeals had to ignore the exposure of the Washington's informant to retaliation, the damage to Washington if it is required to "burn" an informant, and the broader peril to law enforcement generally.

The informant privilege is a firmly established and important part of federal law. It encourages people to assist law enforcement by providing information of wrongdoing which they might withhold out of fear of retaliation absent a promise of anonymity. Roviaro v. U.S., 353 U.S. 53 (1957). To postpone appellate review of an order requiring disclosure of an informant's identity until after the

disclosure takes place is to make such appellate review moot. This result drastically weakens the privilege for law enforcement in all jurisdictions, not just for Washington in MDL-150. In Re United States, 565 F.2d 19, 23, (2d Cir. 1977), cert. denied, 436 U.S. 962 (1978); In Re Attorney General of the United States, 596 F.2d 58, 67-68, (2d Cir. 1979).

C. The Informant Privilege Applies Here and Was Not Waived.

The district court correctly ruled that the informant's privilege was available to Washington in its parens patriae action against Socal and the other oil companies, but incorrectly ruled that Washington waived its privilege.

The informant's privilege exists to promote the public interest in law enforcement by encouraging citizens to communicate their knowledge of unlawful activities to law enforcement officials by preserving their anonymity. Roviaro v. United States, supra. Recognizing the public interest in the enforcement of the federal antitrust laws, the courts have applied the informant's privilege in civil antitrust actions brought by the federal government. See e.g., City of Burlington v. Westinghouse Electric Corp., 246 F.Supp. 839 (D.D.C. 1965) on remand from 351 F.2d 762 (D.C. Cir. 1965); In re Emprise Corp., 344 F.Supp. 319 (W.D.N.Y. 1972); United States v. Kelsy-Hayes Wheel Co., 15 F.R.D. 461 (D.Mich. 1954); United States v. John Deere & Co., 9 F.R.D. 523 (D.Minn. 1974); and United States v. Kohler Co.,

9 F.R.D. 289, 290 (E.D.Pa. 1949). Courts sustaining the privilege in federal civil antitrust actions have noted that the privilege protects against employer retaliation and its capacity to influence information sources. See, e.g., United States v. Kelsy-Hayes Wheel Co., supra, 15 F.R.D. at 461; Wirtz v. Continental Finance and Loan Co., 326 F.2d 561 (5th Cir. 1964).

The public interest in civil enforcement of the federal antitrust laws is the same whether they are enforced by the federal government or a state through its attorney general.

Indeed, the courts have recognized that a civil antitrust damage suit brought by a state attorney general qualifies as an official enforcement action. Fleming v. Federal Trade Commission, 670 F.2d 311 (1982).

Moreover, Congress has encouraged state attorneys general to bring monetary damage actions under federal antitrust laws by passing the parens patriae statute. 15 U.S.C. Sections 15c-15f. As a result, courts have noted "the important place state attorneys general occupy in Congress' scheme for antitrust enforcement." United States v. B. F. Goodrich Co., 619 F.2d 798, 801 (9th Cir. 1980). It follows that the informant's privilege available to the federal government in civil antitrust suits is available to a state attorney general enforcing those laws as well.

The district court, however, incorrectly ruled that Washington waived its right to assert the informant's privilege.

Washington's confidential informant appeared on "The NBC Nightly News" on

October 17, 1979 with his voice and physical appearance disguised beyond recognition. The informant's appearance was made by his arrangement with NBC, who had promised the informant that it would preserve the confidentiality of his identity.

Washington only made NBC's desire to interview the informant known to him. At no time did Washington disclose the confidential informant's identity to NBC. Nevertheless, the district court ruled that Washington waived its right to protect the confidential informant's identity by having "aided in the airing" of the NBC broadcast. (App. B at 3).

This erroneous ruling reflects the court's misconstruction of the waiver exception to the informant's privilege. A correct statement of the law is that the privilege is waived only when the

informant's identity has been disclosed to those who would have cause to resent his communication. Roviaro v. United States, supra; see also United States v. Julius Doochin Enterprises, 370 F.Supp. 942, 941-945 (M.D.Tenn. 1973); United States v. Real Estate Board of Met. St. Louis, 59 F.R.D. 37 (E.D.Missouri 1973) (citing Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958).

The waiver exception recognizes that if an informant's identity is known or admitted, no legitimate purpose is served by the court's continued application of the privilege.

In this case however, no individual or entity having cause to resent the communication of information by Washington's informant has learned of his identity. Clearly, NBC did not resent the informant's communications to the

State of Washington. Rather, NBC's interest was solely journalistic: NBC was not harmed by the informant's communications to it. Thus, the informant's voluntary disclosure of his identity to NBC did not invoke the Roviaro waiver exception.

D. The Writ Should Be Granted

The errors of the courts below do a grave disservice to the cause of law enforcement everywhere. The abdication by the Court of Appeals of its responsibility to review the District Court orders before they are enforced means any future appeal will be mooted. The District Court orders, in turn, stand the waiver doctrine on its head and result in a fundamental weakening of the informant privilege. All of these errors can only be corrected by the grant of a writ of certiorari.

Accordingly, this case raises "an important question of federal law which has not been, but should be, settled by this Court," Supreme Court Rules, Rule 17, so that certiorari should be granted. Certiorari is appropriate where rulings below "threaten the effectiveness" of antitrust enforcement. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 136 (1968), and where the case presents important issues under the antitrust laws. Albrecht v. Herald Co., 390 U.S. 145, 146, (1968); National Broiler Marketing Assn. v. United States, 436 U.S. 816, 818 (1978).

F. Conclusion

For the foregoing reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

DATED: February 21, 1985.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation	NO. 82-6092 D.C. No. CV 77-3487-WPG
STATE OF WASHINGTON, on behalf of itself and its public entities and residents, Plaintiff-Appellant, vs. STANDARD OIL COMPANY OF CALIFORNIA; TEXACO, INC.; UNION OIL COMPANY OF CALIFORNIA; ATLANTIC RICHFIELD COMPANY; EXXON CORPORATION; GETTY OIL CORPORATION; GULF OIL CORPORATION; MOBIL OIL CORPORATION; PHILLIPS PETROLEUM COMPANY; and SHELL OIL COMPANY, Defendants-Appellees.	OPINION

Appeal from the United States
District Court
for the Central District of California

Honorable William P. Gray
Senior United States District Judge,
Presiding

Argued and Submitted: October 3, 1983

Before: KENNEDY, SKOPIL, and PREGERSON,
Circuit Judges.

KENNEDY, Circuit Judge:

This appeal arises out of an antitrust action commenced by the State of Washington against certain oil companies on August 15, 1977. While the case was in the discovery stage, a television broadcast of the "NBC Nightly News" disclosed that an individual, presumably an oil company employee, had acted as a confidential informant by giving the State of Washington vital information regarding price fixing by defendants. Two days after the broadcast, defendant Standard Oil of California served an interrogatory upon

all state plaintiffs requesting the name, address, employer, and employment position of the individual identified on the broadcast as the confidential informant. The State of Washington, through its Attorney General, Kenneth O. Eikenberry, objected to the interrogatory and refused to provide the requested information on the ground that the information was protected by the "informant's privilege" and, therefore, was not subject to disclosure. See Roviaro v. United States, 353 U.S. 53, 59-61 (1957).

The district court ordered disclosure of the informant's identity to a Standard Oil attorney for the purpose of an in camera deposition subject to review and control by further order of the court. The attorney was not to divulge the informant's identity. The

State of Washington appealed the order under 28 U.S.C. § 1292(b), but we dismissed the appeal on jurisdictional grounds. Next, Eikenberry refused to comply with the district court order and was found in civil contempt. The Attorney General appealed both the contempt order and the initial order requiring disclosure, again pursuant to section 1292(b). We reversed and remanded. Eikenberry v. Standard Oil Co., No. 81-5505 (9th Cir. May 19, 1982). We recited there that the jurisdictional basis for the appeal was section 1292(b), but the appellant here advises that this was incorrect. The record on this point is unclear, but, in any event, the supervening case of Kordich v. Marine Clerks Ass'n., 715

F.2d 1392 (9th Cir. 1983), indicates that there is no jurisdiction for a section 1291 appeal as discussed below.

On remand the district court determined that, although the informant's privilege applied to the case, it had been waived by the state. Consequently, the district court ordered disclosure of the informant's identity to Standard Oil's counsel. After Eikenberry again refused to comply with the disclosure order, the district court once more held him in civil contempt. The instant appeal followed under 28 U.S.C. § 1291. We do not reach the merits of Eikenberry's argument regarding the informant's privilege, for we conclude we lack jurisdiction of the appeal.

Jurisdiction under section 1291, as a general rule, extends only to final decisions by the district court.

Eikenberry contends that he may appeal the order imposing sanctions, as he is not a party to the suit, and the order, as to him, is final under section 1291. See Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647, 648 (9th Cir. 1982); Liew v. Breen, 640 F.2d 1046, 1048 (9th Cir. 1981); David v. Hooker, Ltd., 560 F.2d 412, 415-16 (9th Cir. 1977); In re Fish & Neave, 519 F.2d 116 (9th Cir. 1975); Fenton v. Walling, 139 F.2d 608, 610 (9th Cir. 1943). Ordinarily, a nonparty may appeal either a contempt order or a discovery santion before final judgment in the underlying action if the order or santion is directed at him. Such orders are deemed final under 28 U.S.C. § 1291. This rule of appealability is not applicable, however, if there is a substantial congruence of interests between the

nonparty and a party to the action. Kordich, 715 F.2d 1392; Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik, 658 F.2d 944, 950-51 (3d Cir. 1981). This follows from the principle that appealability under section 1291 must be given a "practical rather than technical construction." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981). The section must be construed in light of the underlying purpose to avoid piecemeal review and its attendant delay. See Risjord, 449 U.S. at 374; Eastern Maico Distributors, Inc., 658 F.2d at 947.

In Kordich the district court imposed santions for a frivolous motion and held both the party and its attorney jointly and severally liable. The attorney appealed the sanctions against

him while the underlying action was yet pending in the district court. We dismissed the appeal for lack of jurisdiction, explaining that:

> [T]he congruence of interests between attorney and client here is so great that counsel's status as a non-party is questionable. We see no reason to permit indirectly through the attorney's appeal what the client could not achieve directly on its own: immediate review of interlocutory orders imposing liability for fees and costs.

Id. at 1393.

We find a congruence of interests between Eikenberry and the state in this case, and hold therefore that the order may not be severed from the primary action or treated as final. The case differs from Kordich in that the sanctions were imposed directly on

Eikenberry and not jointly upon him and the state. However, other factors compel the conclusion that there is a congruence of interest between Eikenberry and the state. First, Eikenberry does not deny that the state ultimately will pay the cost of all sanctions against him. The contempt order, therefore, does not place appellant directly at risk. The lack of personal risk to Eikenberry is further demonstrated by the fact that Judge Gray has stayed the sanctions pending the outcome of this appeal. As we explained in Kordich, "[d]ismissal of this interlocutory appeal will not cause appellant any harm." Id. at 1393 n.2. Cf. Union of Professional Airmen v. Alaska Aeronautical Industries, 625 F.2d

881 (9th Cir. 1980) (the payment of sanctions against a nonparty by his employer prior to appeal moots the appeal).

Second, in the role of Attorney General, Eikenberry is not only the counsel for Washington but also the state official in charge of initiating and conducting the course of litigation. The determination whether to bring an action rests within the sole discretion of the Attorney General. Boe v. Gorton, 88 Wash. 2d 773, 776, 567 P.2d 197, 199 (1977) (en banc); Berge v. Gorton, 88 Wash. 2d 756, 761, 567 P.2d 187, 191 (1977) (en banc). It is the Attorney General who has the authority to prosecute the suit. Wash. Rev. Code Ann. § 43.10.030(2) (1983). The complaint in this case stated that the action was brought by the State of

Washington "by and through its Attorney General."

The Attorney General controls the strategy and tactics of the suit, and is the final arbiter of when to resist a discovery order in lieu of risking contempt and its sanctions while continuing litigation. In this regard, the case is unlike In re Irving, 600 F.2d 1027 (2d Cir. 1979). There the general counsel of the NLRB was held entitled to appeal contempt orders directed against him as a prospective witness in a criminal case. The first contempt order was a criminal contempt and appealable on that basis alone. The second contempt order was civil and appealable on the ground that the Board's counsel had no control over the prosecution in which the document was ordered produced. The very control absent Irving is present here,

for the Attorney General is the principal officer of the state charged with bringing the suit. In these circumstances, we conclude that the State Attorney General has a sufficient congruence of interest with the State of Washington to bring the case under the rule of Kordich and render the order nonappealable.

It is true that in Kordich we observed "had the orders at issue here imposed liability solely on [the parties' counsel], we would clearly have jurisdiction." Kordich, 715 F.2d at 1393. In the context of Kordich, that statement was correct, as the traditional relation between attorney and client pertained, the attorney having no control over the ultimate determination to prosecute the case. Where the traditional attorney-client relation

exists, congruence of interest for purposes of appealability will usually turn on whether the discovery order is directed to the attorney alone or jointly to the attorney and to the party. Compare Liew, 640 F.2d at 1048, with Kordich, 715 F.2d 1392. In the case before us, a congruence of interest exists because the Attorney General is the principal officer of the party conducting the litigation. That fact also serves to distinguish our holding in David v. Hooker, Ltd., 560 F.2d at 417, where we held that a corporate officer can appeal a discovery order in a case where the corporate entity, but not the officer, is the party to the suit. And here, as in Kordich but not Hooker, the

ruling can be appealed as a part of the final judgment, since the discovery order was directed to the State of Washington, not the Attorney General individually.

Under the circumstances of this case, we cannot consider Attorney General Eikenberry a nonparty for the purpose of appealing the contempt sanction. Therefore, the general rule precluding a party from taking an interlocutory appeal of a contempt order applies. Johnny Pflocks, Inc. v. Firestone Tire & Rubber Co., 634 F.2d 1215, 1216 (9th Cir. 1980). The appeal is dismissed for lack of jurisdiction.

DISMISSED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION	MDL Docket No. 150-WPG WASHINGTON: No. CV 77-3487-WPG

MEMORANDUM OF DECISION AND ORDER

The Court of Appeals on May 19, 1982, reversed this court's order holding the Attorney General of the State of Washington in contempt for having refused to disclose the name of an informant to an opposing counsel designated to be officer of the court for the taking of the informant's deposition. The case was remanded to this court for further proceedings.

At issue is the availability of the informant's privilege to the State of Washington under the circumstances of this case. In 1979, NBC News executives contacted the office of the Attorney

General of the State of Washington seeking names of people possessing information concerning the events involved in this litigation. According to affidavits submitted by the State of Washington, the office of the Attorney General refused to identify any informants to NBC, but advised the informant that NBC News was interested in his story. On October 17, 1979, the informant appeared on NBC Nightly News, his face and voice disguised beyond recognition, alleging that he personally participated in price-fixing activities among major oil companies. Shortly thereafter, defendant Standard Oil Company of California served the State of Washington with an interrogatory requesting the informant's identity. The State of Washington has refused to answer

this interrogatory, claiming the informant's privilege.

The informant's privilege appears to exist in this kind of action. Roviaro v. United States, 353 U.S. 53 (1957), stands for the proposition that a qualified privilege should be available to law enforcement officials in their work to protect the public interest. This privilege has been recognized by many civil suits and in antitrust actions brought by the Federal Government. See., e.g., City of Burlington v. Westinghouse Electric Corp., 246 F. Supp. 839 (D.D.C. 1965); U.S. v. Kohler, 9 F.R.D. 289 (E.D. Pa. 1949); U.S. v. John Deere and Co., 9 F.R.D. 523 (D. Minn. 1949). In light of the parens patriae statute (15 U.S.C § § 15c-15f) in which Congress encouraged monetary damages suits under the federal antitrust

laws brought by the state attorneys general, it stands to reason that the informant's privilege should be available to these state law enforcment officers seeking to aid in the enforcement of federal law.

Assuming, then, that the privilege does exist, it would appear nevertheless to have been waived by Washington's subsequent actions. However brief its role, Washington unquestionably aided in the airing of serious allegations against the defendants on national television. While, as plaintiffs argue, there certainly exists a duty on the part of state officials to aid the media in disseminating information of public concern, there also exists the right of those publicly accused of wrongdoing to face and answer their accusers. Law enforcement officials cannot help

informants air their views supporting the Government's contentions in the litigation and then use the privilege to shield those informants from cross-examination. It seems to me that in such situations, officials must choose: either their informant may tell his story both to the American public and to the defendants, or he is available to neither, pending resolution of the case in question. Although the officials cannot prevent an informant from volunteering to appear on national television, they must cause him to understand that if he does so appear they cannot ensure his continued anonymity.

Accordingly it is ordered that on or before thirty days after the entry of this order, the State of Washington shall reveal to counsel for defendant Standard Oil Company of California the name,

address and last employer of the individual who appeared disguised on the NBC Nightly News program on October 17, 1979.

DATED: October 7, 1982.

WILLIAM P. GRAY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION	MDL Docket No. 150-WPG WASHINGTON: No. CV 77-3487-WPG

ORDER OF CONTEMPT

This Court's Memorandum of Decision and Order, dated October 7, 1982, directed plaintiff State of Washington to disclose within thirty days the name, address and last known employer of the person who appeared disguised on NBC Nightly News of October 17, 1979, to counsel for defendant Standard Oil Company of California. This Order is based on this court's determination that the State of Washington has waived any privilege which may have existed to protect the identity of this disguised person by having cooperated in

facilitating his appearance on national television.

By an affidavit dated November 2, 1982, Kenneth O. Eikenberry, Attorney General of the State of Washington, advised the Court that he respectfully declined to obey the Order of October 7, 1982, for the stated purpose of securing appellate review of said Order.

This Court, finding that the Attorney General of the State of Washington has stipulated to the jurisdiction of the Court over his person, that the Attorney General is fully advised concerning the order of this court, that he has in his possession the name, address and last known employer of the disguised person and is able to comply with the Order of October 7, 1982, and that he continues to decline to comply with said Order:

It is hereby adjudged and ordered as follows:

1. The Attorney General of the State of Washington, Kenneth O. Eikenberry, is in contempt of this Court for his refusal to comply with this Court's Memorandum of Decision and Order dated Octboer [sic] 7, 1982.

2. Attorney General Eikenberry commencing this date shall pay a civil sanction in the amount of $100 for each day that he fails to comply with the Order of October 7, 1982.

3. The provisions of paragraph 2 of this Order are stayed until 10 days after the latest of the following dates:

(a) If a notice of appeal from this Order is not filed within 30 days from the date of this Order, then 31 days from the date of this Order.

(b) If a notice of appeal from this Order is filed within 30 days from the date of this Order, then 31 days from the date of any Order of the Court of Appeals which disposes of that appeal from this Order.

(c) If a petition for writ of certiorari seeking review of the Order of the Court of Appeals referred to in subparagraph (b) is filed in the United States Supreme Court, then the date of completion of proceedings on that petition in the Supreme Court.

4. The Attorney General of the State of Washington shall reimburse defendant Standard Oil Company of California its reasonable expenses including attorneys' fees incurred beginning January 5, 1981, with respect to Washington's failure to comply with

the Order of October 7, 1982. The amount to be reimbursed shall be determined by the Court upon completion of any appellate proceedings as referred to in paragraph 3 above.

Dated: November 17, 1982

WILLIAM P. GRAY
United States District Judge

APPENDIX D

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM P. GRAY,
JUDGE PRESIDING

IN RE:	)	
	)	
COORDINATED PRETRIAL	)	MDL Docket
PROCEEDINGS IN	)	No. 150 WPG
PETROLEUM PRODUCTS	)	
ANTITRUST LITIGATION	)	All State Cases

REPORTER'S TRANSCRIPT

OF PROCEEDINGS

Los Angeles, California
April 30, 1981

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LOS ANGELES, CALIFORNIA;
THURSDAY, APRIL 30, 1981;
1:45 P.M.

-- -- -- --

THE COURT: Good afternoon.

THE CLERK: Item No. 1, MDL-150, In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation.

THE COURT: Ladies and gentlemen. The first tem o n the agenda for today is the litigation with the State of Washington concerning the secret informant, and the contempt proceedings.

On January 9, 1980, this Court entered an order requiring a limited disclosure of the informant who had appeared on an NBC program sometime before. Neither the Attorney General of Washington nor his subordinates complied with that order, and instead sought an appeal.

The appeal was dismissed as having been improvidently granted. I assume that is because the Court of Appeals felt that the proper procedure would be for a contempt order to issue, thus creating an appealable order.

The matter was remanded to this Court, and on March 26 of this year I ordered the Attorney General and his subordinates to comply with the previously made order within ten days or show cause at this time why they should not be held in contempt for not doing so.

Attorney General Eikenberry of Washington has made a submission in which he acknowledges the jurisdiction over him of this Court, contends that in his view and the view of his colleagues the order was wrong, and he should not have to comply, and of course he asserts the obvious, that if he complies, why, it

makes any appeal moot. He desires to appeal, and, therefore, in order to get an appealable order he declines to adhere to the Court's order, and has instructed his colleagues not to comply with the Court's order. He went on to say, if this Court's order is sustained on appeal, he will comply.

That is what I intend to do with respect to the Attorney General, therefore. First, I want to state that I understand the position of the Attorney General. Naturally, I believe that the order entered by this Court was an appropriate order that should be complied with, but he has a right to seek to get the Court of Appeals to secondguess [sic] this Court, and I respect that; and I also appreciate the respectful manner in which Mr. Eikenberry has made his submission to this Court.

I will take such action as is needed in order to preserve the integrity of this Court's order. On the other hand, I desire to do so without interfering any more than necessary with the sensibilities of the Attorney General of Washington.

Therefore, with respect to him, it is adjudged that the Attorney General of Washington, Mr. Eikenberry, is in contempt for having failed to carry out the order entered on January 9, and, therefore, beginning ten days after this order becomes final, the Attorney General shall pay a penalty of $100 per day for each day that he fails to comply with this order. I assume that no payment will be made, because, as I say, I accept the assurance that the order will be complied with as soon as this order becomes final, but I make this order for

two purposes: First, to give Mr. Eikenberry an appealable order, and, second, because I expect that I must impose some sanction to require compliance.

I will state that this is minimal, and if compliance is not made with this Court's order as soon as it becomes final, why, it will be my intention to take additional sanctions, including the dismissal of the Washington action, but, as I say, I think that this is not necessary to engage in further, because I expect the orer to be adhered to.

This order will be stayed, of course, until it becomes final, and, as I said, also for ten days thereafter.

Mr. Ellis, with respect to the order concerning the Attorney General, have I covered all the bases? Do you

understand the order and do you find any problems with respect to it?

MR. ELLIS: Your Honor, we believe that in view of the fact that the Attorney General has indicated that he intends to comply with the Court's previous orders in the event that we are unsuccessful on appeal, and the fact that he is able to comply -- he has the name of the informant in his possession -- we feel that the $100 per day fine, which, if for any reason it were to go into effect, would amount to $365,000 dollars a year, is a very steep fine and goes beyond what is necessary.

We understand the order and understand the Court would like Mr. Mac Laury and myself to present an order reflecting these rulings.

THE COURT: Yes. You have answered my question, and you have also answered my next question.

With respect to Mr. White and Mr. Little, you will recall I directed an order to show cause upon them, but inasmuch as I understand you have assured the Court that the Attorney General himself is in position to carry out the terms of the order -- that is, he is aware of the identity of the individual concerned -- therefore, upon this order's becoming final and his being able to comply with it, the Court concludes it is not necessary to impose any further sanction upon Mr. White and Mr. Little. You do give the Court such assurance, I understand.

MR. ELLIS: I can personally assure the Court that the Attorney General has the name of the informant in his possession.

THE COURT: Then no further order will be made with respect to the subordinates in the Attorney General's office, particularly Mr. White and Mr. Little.

Mr. Mac Laury, would you and Mr. Ellis undertake or would you draw an appropriate order and get his approval as to form.

MR. MAC LAURY: I will, your Honor.

If I may make a point, as I understood your Honor's comments, you were making this contempt order, I think your Honor stated, "effective when the order." I assume you mean when your order of January 9, 1980 becomes final.

THE COURT: Yes.

MR. MAC LAURY: That raises the question, your Honor, as to the appealability of your Honor's order. I think your Honor's order would becom apeallable only if --

THE COURT: I see.

MR. MAC LAURY: -- it becomes effective today.

THE COURT: All right. It is a matter of semantics.

MR. MAC LAURY: It is a matter of semantics. And then stay it.

THE COURT: Suppose I make it effective today and then stay the order pending appeal.

MR. ELLIS: I think that would be appropriate, but that is certainly a point that Mr. Mac Laury and I could deal with in the contect of the order that he is going to prepare.

THE COURT: That is what I meant to say the first time, and that will be the order.

MR. MAC LAURY: One other thought, your Honor. I did request as part of the Rule 37(b) punishment that the Attorney General of the State of Washington be required to reimburse SoCal for its expenses incurred after January 5, 1981, the date we were notified by Washington that it was not going to comply.

THE COURT: I neglected to do that. I intend so to do. The amount will be included by the Court at such time the order becomes final.

MR. ELLIS: Let me state under 37(b)(2), which is the basis for Mr. Mac Laury's request, that an award of attorneys fees and expenses is not appropriate on the grounds that the

Attorney General's failure to comply with the Court's prior orders was substantially justified. It was the only route available to him, and accordingly there is no basis under the rule for request of fees and costs.

THE COURT: All right. I have expressed my views as to my respect for the Attorney General and my understanding of the position he has taken, but, nonetheless, as I said also, I believe that the order is appropriate and should be carried out, and that Mr. Mac Claury's [sic] clients should be reimbursed for expenses incurred in undertaking to make sure it is carried out.

So, therefore, attorneys fees will be accorded in such amounts as the Court shall determine once the order becomes final.

Does that take care of item number one, gentlemen?

MR. ELLIS: I believe it does, your Honor.

THE COURT: All right.

All right, number 2.

The defendant's motion for an order compelling the plaintiffs to produce documents and answer interrogatories. Would it be satisfactory if in accordance with our usual procedure I indicate what I learned from your briefs and what I intend to so subject to argument.

MR. MITTELSTAEDT: Yes, your Honor.

MR. CLARK: Yes, your Honor.